No. 97-719

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Supreme Court of the United States

October Term, 1997

GEORGE STUART, Secretary, as Head of the Florida Department of Business and Professional Regulation, and John P. Baumann, Jr., Charles H. Calhoun, Shaun M. Davis, Malcolm R. Duggan, Mirtha V. Martin, Francisco J. Paredes, Andrea A. Spottswood, David MacNamara, and Zoya W. Phillips, in their official capacities as Members of the Florida Board of Accountancy,

Petitioners,

vs.

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., a Delaware Corporation, and STEPHEN M. MILLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the State of Florida's regulation of nonexpressive conduct governing the practice of public accounting is required to meet First Amendment standards simply because Florida defines the practice of public accounting as "holding out" that a person has a state license as a "CPA" when performing certain accounting services?

2. Whether the State of Florida can condition a state licensee's use of a state created title, "CPA", on compliance with the statutes and rules governing nonexpressive conduct in the practice of public accounting without implicating or violating the First Amendment?

3. Whether "holding out" that an individual has a state license to practice public accounting ("CPA"), and providing certain public accounting services while intentionally violating the state's regulatory requirements governing the practice of public accounting is false and misleading?

4. Whether, if the First Amendment is implicated, the State of Florida regulatory scheme for the practice of public accounting is narrowly tailored and meets the *Central Hudson* test?

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The Florida Institute of Certified Public Accountants ("FICPA") respectfully submits this brief as an amicus curiae in support of the Petition for Writ of Certiorari in accordance with Rule 37 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief[1].

INTERESTS OF THE AMICUS CURIAE

The FICPA is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. The FICPA was involved in the decisions below as an amicus curiae. Founded in 1905, the FICPA is an active professional organization of approximately 18,700 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public. The FICPA is the sixth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government, and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States; monitoring legislation affecting the practice of public accountancy; assisting in the development of auditing, accounting, and ethical standards; educating the public about the responsibilities of CPAs, and participating in litigation that affects the practice of public accountancy. These areas of activity directly relate to the issues now before this Court.

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1. This brief was authored in full by the undersigned counsel for the FICPA. No one other than the FICPA made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE QUESTION RESERVED IN *IBANEZ*.

In *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 512 U.S. 136, 139 (1994), this Court held that the Florida Board of Accountancy's ("Board") reprimand of an attorney/CPA for engaging in "false, deceptive and misleading" advertising was "incompatible with First Amendment restraints on official action." The Court stated, however, that Ibanez "ha[d] neither been charged with, nor found guilty of, any professional activity or practice out of compliance with the governing statutory or regulatory standards." 512 U.S. at 144. Thus, the majority implied, but did not hold, that the Board could have successfully disciplined Ibanez for practicing public accountancy in violation of Florida's regulatory requirements.

In a separate opinion, Justice O'Conner, joined by the Chief Justice, was more direct:

> I would only point out that it is open to the Board to proceed against petitioner for practicing public accounting in violation of statutory or regulatory standards applicable to Florida accountants. . . . And if petitioner's public accounting license is revoked, the State may constitutionally prohibit her from advertising herself as a CPA.

512 U.S. at 153 (O'Conner, J., dissenting).

This case is a preemptive strike by a state-licensed CPA ("Miller"), who seeks permission in advance to violate certain of Florida's regulatory requirements for the practice of public accountancy by expanding the holding in *Ibanez*. Miller seeks to "hold out"[2] as a CPA while providing accounting and tax services to the public. This combination of conduct constitutes the "practice of public accountancy" under Florida's Public Accountancy Act[3] ("Act") and subjects Miller and the services he provides to the full panoply of regulation[4] by the Board. *See* Fla. Stat. § 473.302(5) (1995). Those regulations include a

2. The term "holding out" has been defined by Florida as:

> [A]dvertising, as part of a licensee's business activities, that the licensee is a certified public accountant when providing, or offering to provide, services or products to the public which involve the use of accounting skills or one or more types of management advisory or consulting services.

Fla. Stat. § 473.302(6) (1995).

3. Chapter 473, Florida Statutes (1995).

4. The technical standards that apply when a licensee practices public accountancy include, without limitation, standards for accounting and review services, standards for management advisory services, standards for tax practice and standards for business valuations. *See* Fla. Admin. Code Ann. §§ 61H1-20.009, 61H1-20.0095, 61H1-22.0086 and 61H1-20.0098. Other applicable regulations include provisions requiring independence (Fla. Admin. Code Ann. § 61H1-21.001), requiring integrity and objectivity (Fla. Admin. Code Ann. § 61H1-21.002), prohibiting certain commissions (Fla. Admin. Code Ann. § 61H1-21.003), prohibiting certain contingency fees (Fla. Admin. Code Ann. § 61H1-21.005), governing record ownership (Fla. Admin. Code Ann. § 61H1-23.002) and requiring that a licensee protect a client's confidential information from disclosure (Fla. Admin. Code Ann. § 61H1-23.001). As discussed in Section IV, below, the Eleventh Circuit's decision implies that all of these technical and regulatory standards must pass muster under the First Amendment to be valid and enforceable.

requirement that a licensee who practices "public accountancy" do so in a firm licensed by the Board of Accountancy ("Board") as a CPA firm. *See* Fla. Stat. §§ 473.309 and 473.3101 (1995).

Miller's employer, American Express Tax and Business Services, Inc. ("American Express") is a corporation owned by a publically traded company. The Act requires that a licensed CPA firm be controlled by individuals who are licensed CPAs. *Id.* American Express is not controlled by individuals who are licensed CPAs; therefore, American Express can not be licensed as a CPA firm. Consequently, Miller's employer, in its current form, cannot comply with Florida's form of practice and firm licensure requirements. Rather than complying with these requirements, Miller and his employer seek to destroy Florida's long standing regulatory framework for the practice of public accountancy on grounds that Florida's form of practice and firm licensure requirements for CPAs practicing public accountancy violate the First Amendment.

As correctly noted by the Eleventh Circuit,

> [t]his case squarely presents the very question the Supreme Court reserved — whether the First Amendment is implicated when the Board threatens prosecution of a CPA for holding out while performing accounting and tax services in an unlicensable firm.

Miller v. Stuart, 117 F.3d 1376, 1381-82 (11th Cir. 1997). Although the majority in *Ibanez* reserved ruling on this question, the Chief Justice and Justice O'Conner addressed it and answered in the negative. The Eleventh Circuit answered affirmatively. The Petition should be granted so the Court can address the question it reserved for future consideration in *Ibanez*.

II.

THE DECISION BELOW CONFLICTS WITH ANOTHER CIRCUIT.

Although the Eleventh Circuit does not agree with Justice O'Conner and the Chief Justice, the Ninth Circuit does. In *Johnson v. California State Board of Accountancy*, 72 F.3d 1427 (9th Cir. 1995), a case decided after *Ibanez*, the Ninth Circuit considered whether the First Amendment was implicated when California's Board of Accountancy attempted to discipline a CPA licensee for violating the state's prohibition against accepting commissions while practicing public accountancy. 72 F.3d at 1428. Under California law, a licensed CPA ("licensee") who does not hold out as a CPA can perform accounting services and accept compensation in the form of a commission. *See* 72 F.3d at 1430-31. However, if the same licensee performs the same services while holding out as a CPA, the licensee's actions violate California law, because the licensee is engaged in the practice of public accountancy, and has failed to observe California's prohibition against accepting commissions while practicing public accountancy. *Id.*

In *Johnson*, the Ninth Circuit held that the "holding out" component of California's definition of the "practice of public accountancy" does not compel application of an enhanced scrutiny/First Amendment standard of review to a state disciplinary action against a CPA for accepting commissions while engaged in the practice of public accountancy as so defined. 72 F.3d at 1432-33. The Ninth Circuit correctly noted that

> [California law] uses the equivalent of the phrase "holding out" to identify and define *conduct* indicative of the practice of public accountancy . . . [and] does not ban any commercial information.

Id. (emphasis added). Based on this finding, the Court declined to use a "strict scrutiny" standard and affirmed a trial court decision applying the "rational basis" test to the California Board's decision to discipline the CPA who accepted commissions while practicing public accountancy. 72 F.3d at 1433.

Florida's regulatory framework for the "practice of public accountancy" is like California's. In the case below, however, the Eleventh Circuit considered Florida's CPA firm licensure and form of practice requirements for CPAs practicing public accountancy, and reached a different conclusion:

> We reject the proposition that the State of Florida's statutory scheme is insulated from First Amendment review because it incorporates commercial speech into a class of regulated activity it refers to as public accountancy.

117 F.3d at 1382. Based on that finding, the Eleventh Circuit affirmed an injunction prohibiting the Board from enforcing the Act's firm licensure and form of practice requirements for CPAs who practice public accountancy. 117 F.3d at 1385.

The conflict between the two circuits is clear. The Ninth Circuit recognized that the act of "holding out" as a CPA can properly trigger exercise of state police power over persons who are licensed by a state as a CPA, and let stand a lower court ruling applying the rational basis test to the underlying disciplinary action. By contrast, the Eleventh Circuit relied upon commercial speech doctrine to affirm an injunction prohibiting the Board from enforcing statutes that regulate professional conduct, but do not ban or limit speech. The two decisions reflect fundamentally different views on how the statutory definition of the "practice of public accountancy" fits into the regulatory

framework for public accountancy. The two decisions also reflect disparate views about where the boundary between economic regulation and the freedom of commercial speech has or should be drawn. The Petition should be granted so the conflict can be resolved.

III.

THE DECISION BELOW THREATENS TO OVERTURN DECADES OF PROFESSIONAL REGULATION.

The Eleventh Circuit's decision threatens the ability of the states to regulate professionals and professional services. States commonly require that licensed individuals who provide professional services through firms do so only through firms that are controlled by licensed professionals. For example, almost every jurisdiction other than the District of Columbia forbid non-attorneys from becoming law firm partners.[5] Other states have adopted similar requirements for other professions. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (pharmacists); *Garcia v. Texas State Bd. of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *aff'd*, 421 U.S. 995 (1975) (physicians); *Mitchell v. Louisiana State Bd. of Optometry Examiners*, 245 La. 1, 156 So. 2d 457 (1963) (optometrists).

Form of practice requirements like these are designed to protect the consumers of professional services, and the evidence below proved that they work. Here, the Board produced empirical evidence that professionals who work for a firm

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5. *See* ABA Model Rules of Professional Conduct, Rule 5.4(b) (1983) ("a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law").

controlled by licensed professionals conduct themselves differently than those employed by firms that are not. [Record below at R5-119-34-37, R6-132 and Ponemon Report at 12-20] Another expert in the field testified that violations of professional standards are much less likely to occur within a licensed and regulated firm that is controlled by CPA shareholders, based on the strength of both internal and external motivations and sanctions. [Record below at R5-119-34-36, R6-132 and Holstrum at 21-23] This evidence is consistent with one of the rationales used to justify form of practice regulations,[6] and demonstrates the importance of maintaining those standards.

More specifically, the Eleventh Circuit's decision threatens the viability of "title acts" as a means to regulate professional conduct. A "title act" protects the public by assuring consumers that persons who "hold out" to the public as a licensed professional meet the technical and other regulatory requirements imposed by a state in connection with the use of that license. A "practice act," by contrast, prohibits all but the licensed individuals from performing the regulated activities. *See, e.g., Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992).

A solid majority of the states have adopted definitions of the "practice of public accountancy" that include "holding out" as an element.[7] These states do not impose a licensing

6. *See, e.g., Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1385 (7th Cir. 1992) (requirement that a law partnership be composed entirely of lawyers "promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law" and "minimize[s] the number of situations in which lawyers will be motivated by economic incentives rather than by their clients' best interests").

7. *See, e.g.*, Cal. Bus. & Prof. Code § 5051 (Deering 1996); Conn. Gen. Stat. Ann. § 20-279(b)(7) (West Supp. 1997); Haw. Rev. Stat. § 466-3 (1996); Idaho Code § 54-206(20) (1997); Ind. Code Ann. § 25-

(Cont'd)

requirement on all persons who provide accounting services to the public, but give consumers a choice to purchase regulated or unregulated accounting services. The states' interest in fostering the integrity of the accounting profession is advanced because the regulatory and technical standards for the practice of public accountancy apply only to CPAs who seek to provide accounting services while capitalizing on the public's perception that licensed CPAs possess superior skills, independence, and professionalism. This approach leaves unregulated the services of persons who do not capitalize on their state licensure as a CPA. This approach has been used around the country for many years.[8]

The Ninth Circuit's decision in *Johnson* complements a title act approach to accountancy regulation, because it treats the

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(Cont'd)
2.1-1-10(a) (Michie 1997); Iowa Code § 542C.2 (1996); Ky. Rev. Stat. Ann. § 325.220(5) (Michie 1996); La. Rev. Stat. Ann. § 37:72 (West 1996); Me. Rev. Stat. Ann. tit. 32, § 12201 (West 1996); Mass. Ann. Laws ch. 112, § 87A (Law. Co-op 1997); Mich. Comp. Laws Ann. § 339.702(1)(d) (West 1993); Minn. Stat. § 326.165(2) (1996); Nev. Rev. Stat. Ann. § 628.023 (Michie 1995); N.H. Rev. Stat. Ann. § 309-B:2 (VI) (1995); N.M. Stat. Ann. § 61-28A-3.G & I (Michie 1997); N.Y. Educ. Law § 7401 (McKinney 1993); N.C. Gen. Stat. § 93-1(a)(5) (1996); N.D. Cent. Code § 43-02.2-02.6 (1997); Okla. Stat. tit. 59, § 15.1A.26 (1996); Pa. Stat. Ann. tit. 63, § 9.2 (West 1997); Tenn. Code Ann. § 62-1-103(7) (1997); Tex. Rev. Civ. Stat. Ann. art. 41A1.2(a)(6)(A) (West Supp. 1997); Utah Code Ann. § 58-26-2(12) (1997); Vt. Stat. Ann. tit. 26, § 13(7) (1996); Wash. Rev. Code Ann. § 18.04.025(5) (Michie. 1996); W. Va. Code § 30-9-2 (1997); Wis. Stat. Ann. 442.02 (West 1988); Ga. Comp. R. & Regs. r. 20-2-.11 (1997); Ill. Admin. Code tit. 68, § 1430.500(q) (1997); Kan. Admin. Regs. 74-5-2(g); Md. Regs. Code tit. 9, § 24.01.01(6)(a) (Supp. 1993); Rules and Regulations of the Mississippi State Board of Accounting, 1 C.C.H. *Acct. L. Rpts.* ¶ 26,105(m); Mo. Code. Regs. Ann. tit. 4, § 10-2.005(9) (1997); Neb. Admin. R. & Regs., tit. 288, Ch. 3.001(17) (1993); Ohio Admin. Code § 4701-1-09(A) (1997).

8. Gellhorn, *Occupational Licensing — A Nationwide Dilemma*, J. Acct. 39, 42-43 (Jan. 1960).

"holding out" element of the definition of the practice of public accountancy as conduct, not speech, and declined to subject California's prohibition on accepting commissions to First Amendment scrutiny. The Eleventh Circuit's decision threatens the viability of title acts by requiring that all professional conduct regulations that become operative when a licensee "holds out" as a licensee meet First Amendment standards, even though such regulations proscribe non-speech based conduct such as complying with professional technical standards.

For example, under Florida law, a licensed CPA ("licensee") who does not holds out as a CPA can perform accounting services, such as preparing financial statements, in the same manner as an unlicensed and unregulated person. When such a licensee prepares financial statements, the licensee is not required to issue financial statements that are in compliance with the technical standards required for statements prepared by CPAs who are practicing public accountancy. However, if the same licensee issues the same financial statements while holding out as a CPA, the licensee's actions would violate the Act, because the licensee would be engaged in the practice of public accountancy as defined in the Act, and would have failed to comply with the technical standards for preparing and issuing financial statements prescribed by the Board[9]. Under the Eleventh Circuit's analysis, such a licensee could assert: (1) that the provision of services in a legal manner are only made illegal because the licensee holds out as a CPA; and (2) that the technical standards therefore prevent a licensee who issues such statements from holding out as a CPA.

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9. Those standards are incorporated into one of the Board's rules and include requirements on the form of the financial statements and would require Miller to issue statements compiled in accordance with the AICPA's Statements on Accounting and Review Services. *See* Fla. Admin. Code Ann. § 61H1-20.009 ("Standards for Accounting and Review Services," *incorporating by reference*, 2 C.C.H. *AICPA Professional Standards* AR § 100.09-.22 (1997)).

Under the Act, the manner in which a CPA licensee is legally able to provide accounting services changes if the licensee holds out to the public as a CPA when providing those services. If the licensee holds out as a CPA while performing accounting services, the licensee must follow the technical standards governing the provision of accounting services[10]. Otherwise, the licensee does not. This regulatory framework is identical to the framework to which First Amendment scrutiny was not applied in *Johnson*.

Importantly, this analysis applies to Florida's form of practice and firm licensure requirements as well. As a licensed CPA, Miller can perform accounting services for the public as an employee of an unlicensed firm. However, if he holds out as a CPA, his actions would be in violation of the Act, because he is not in compliance with Florida's form of practice and firm licensure requirements. Again, conduct that conforms with the Act if Miller does not hold out as a CPA violates the Act if Miller does hold out. This situation will exist as long as the Board continues to use the current definition of the practice of

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10. The Act distinguishes between requirements that relate to the status or ability of an individual to hold a CPA license, such as the maintenance of good moral character and continuing education, and regulations that apply to the services performed by persons who practice public accountancy. The former apply to anyone holding a CPA license, regardless of the type of services they provide to the public, but do not regulate the accounting, tax or other services provided by CPAs who are not practicing public accounting. For example, to hold an active CPA license, a CPA employed as a truck driver must meet the continuing education requirements of Chapter 473. This does not mean, however, that trucking services are regulated by the Board of Accountancy. As long as he does not "hold out" as a CPA while providing accounting services to the public, Miller's accounting services are no more regulated than if his services were trucking services. Some of the requirements that should apply if Miller "holds out" as a CPA while providing accounting services to the public are listed in note 4, above.

public accounting for purposes of identifying licensees to which its regulations apply.

Under the flawed logic used below, the Board would be precluded from enforcing applicable technical and regulatory standards against Miller if he prepares financial statements for the public and states that he is a CPA, because doing so would violate the First Amendment. This logic effectively applies stringent First Amendment scrutiny to Florida's technical and regulatory standards for the practice of public accountancy, even though such standards do not ban or regulate speech, and makes professional regulation under a title act approach virtually impossible. This is precisely the logic that was rejected in *Johnson*.

Indeed, unless the Eleventh Circuit's decision is reversed, the only alternatives available to the states would be to abandon significant portions of the regulation of CPAs or to attempt to completely occupy the field by regulating all CPAs whether or not they state that they are CPAs when providing accounting services. Under the latter approach, all accounting services provided by a licensed CPA would be regulated public accounting services, and a licensed CPA would be precluded from providing accounting services in unlicensed firms whether the licensee states that the services are being provided by a CPA or not.

Ironically, this approach would be less narrowly tailored than the regulatory framework currently used by Florida and a majority of the other states, and would fully regulate accounting services performed by CPAs who are not attempting to capitalize on their licensure as a CPA. Due to its breadth, this approach could be subject to its own legal challenge on grounds that the public would not expect that services provided by a CPA who does not hold out as such are being provided by a CPA or are

regulated by the state. *See Cenac v. Florida State Bd. of Accountancy*, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Eliminating the ability of states to regulate a profession using a title act approach would adversely affect consumers and would take from the states an important mechanism for regulating professionals, thereby harming the states' ability to protect the public and to provide consumers with choices regarding the type of services they wish to purchase.

The Petition should be granted so that the Court can consider and correct the adverse effect of the Eleventh Circuit's decision on the ability of the states to regulate professionals.

IV.

THE ELEVENTH CIRCUIT'S COMMERCIAL SPEECH ANALYSIS WAS DEFICIENT AND ITS DECISION WAS ERRONEOUS.

The Petition should also be granted because the Eleventh Circuit's commercial speech analysis was erroneous in several areas.

A. At Best, Florida's Regulatory Framework for Public Accountancy Only Incidently Implicates Speech.

First, the Eleventh Circuit erred by finding that Florida's regulatory framework for the practice of public accountancy operates to ban speech. By their terms, the three statutes enjoined below do not ban speech or restrict expression. Florida has not acted to enjoin Miller from holding out as a CPA, nor has it adopted a rule prohibiting him from doing so. Miller is not prohibited from disclosing his licensure as a CPA; rather, Miller is unwilling to meet the requirements imposed by the state for those who wish to practice public accountancy.

Before he began working for American Express, Miller held himself out as a CPA and engaged in the practice of public accountancy in his own licensed accounting firm. Miller made a decision to work for American Express, an unlicensed firm. Any limitation on Miller's ability to use the CPA title is an incidental effect of his choices regarding his business activities and whether to observe otherwise legitimate professional regulations. Clearly, Miller is not seeking only the right to "hold out" as a CPA, but rather, the right to disregard the accountancy laws and rules for CPAs that he does not want to follow.

There is no First Amendment right to practice a profession, generally, or to do so as an employee of a corporation, specifically. Courts have recognized that restrictions on the conduct of a professional do not implicate the First Amendment so long as the purpose of the regulation is tied to the state's valid concern that the professional's conduct meet appropriate standards both as to the entry into the profession and its practice.[11] "The power of government to regulate the professions is not lost whenever the practice of a profession entails speech." *See Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Any restriction on protected speech implicit in Florida's regulatory framework is a function of the decisions made by Miller, is incidental to the regulation of services provided by persons who practice public accountancy, and does not warrant the kind of First Amendment scrutiny applied by the Eleventh Circuit.

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11. *Accountant's Soc. of Virginia v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988); *Daly v. Sprague*, 742 F.2d 896 (5th Cir. 1984); *Monroe v. Horwitch*, 820 F. Supp. 682, 685 (D. Conn. 1993), *aff'd*, 19 F.3d 9 (2d Cir. 1994) (paralegal prevented from engaging in the unauthorized practice of law); *Garcia v. Texas St. Bd. of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *aff'd*, 421 U.S. 995 (1975).

B. The First Amendment Does Not Protect False Speech.

It is well settled that "the State may ban commercial expression that is fraudulent or deceptive without further justification." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Likewise, a state may ban misleading speech without violating the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976). Assuming, *arguendo*, that Florida's regulatory framework operates to impose a limitation on Miller's use of the term "CPA," the Eleventh Circuit erred by failing to find that Miller's proposed use of the term "CPA" while providing accounting services to the public in an unlicensed firm is inherently false, and therefore, not entitled to protection under the First Amendment, because such services are not regulated CPA services.

The term "CPA" is not a generic educational attainment, but rather, a state created term that denotes licensure by the State of Florida as a regulated professional. A licensee who uses the title "CPA" in Florida thereby represents to the public that he or she works for or is a member of a licensed firm. Through the Act, Florida has defined public use of the term "CPA" to include a message that persons who use the term "CPA" while providing accounting services are practicing in a licensed CPA firm that is controlled by CPAs and is regulated by the state. Miller has chosen to work for an unlicensed CPA firm, and his employer is not regulated by the state as a CPA firm. Thus, by definition, for Miller to state that he is a CPA while providing accounting services as an employee of American Express is false with regard to the type of services being provided, and is not entitled to First Amendment protection.

Importantly, while the Board presented evidence showing that Miller's use of the term "CPA" when providing accounting

services as an employee of American Express is likely to confuse or mislead the public[12], his use of "CPA" is not false for that reason alone. It is also false because such use is inconsistent with the regulatory framework for the practice of public accountancy adopted by Florida. On the facts of this case, Miller's use of the term "CPA" is false and the Eleventh Circuit erred by using the First Amendment to prevent Florida from enforcing otherwise valid requirements in the Act.

C. The Eleventh Circuit Misapplied *Central Hudson*.

Assuming, *arguendo*, that the First Amendment is implicated when the Board can discipline a CPA for holding out while performing accounting services in an unlicensable firm, the Petition should be granted because the Eleventh Circuit misapplied the commercial speech standards in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

First, while the Eleventh Circuit cited the *Central Hudson* standards for evaluating commercial speech, it never applied those standards to Sections 473.309 and 473.3101, Florida Statutes, two of the statutes enjoined by the district court. Under a proper *Central Hudson* analysis, a court must consider whether the state has a substantial interest in proscribing speech, whether the regulation in question advances the asserted state interest in a direct and material way, and whether the restriction inherent in the regulation is in reasonable proportion to the interest served. *See Miller*, 117 F.3d at 1382. The opinion below does not evaluate whether Florida's CPA firm licensure or form of practice requirements advance any asserted state interest, or whether some restriction on speech in Sections 473.309 or 473.3101 is in proportion to the interests served. Nevertheless, the Eleventh

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12. *See* subsection C, below.

Circuit used these standards to enjoin enforcement of those two statutes. If the *Central Hudson* standards can properly form the basis to enjoin enforcement of Sections 473.309 and 473.3101, Florida Statutes, the Eleventh Circuit should have specifically applied those standards to the statutes it enjoined. The Eleventh Circuit erred by failing to do so.

Second, the Eleventh Circuit erred by finding that:

> the State of Florida has failed to justify the speech restriction inherent in the statutory scheme, . . . because it has not shown the scheme to be narrowly tailored.

See 117 F.3d at 1384. As previously noted, any speech restriction inherent in Florida's regulatory framework is solely a function of Miller's desire to work for an unlicensable corporation. Florida has given consumers a choice to purchase accounting services from persons subject to different degrees of state licensure and regulation while maintaining the integrity of the public accounting profession. Its chosen method to accomplish this goal applies the regulatory and technical standards for the practice of public accountancy only to CPAs who seek to capitalize on the public's perception that licensed CPAs possess superior skills, independence, and professionalism, while leaving unregulated persons who do not seek to capitalize on their state licensure as a CPA. By regulating the practice of public accountancy in this manner, the Florida has narrowed the application of the substantive provisions of its regulatory scheme to only those CPAs who choose to trade on his or her CPA license while providing accounting services to the public. Neither Miller nor the Eleventh Circuit have identified a means to accomplish Florida's goal that is more narrowly tailored than the framework adopted by Florida.

Finally, the Eleventh Circuit erred by affirming the trial court's finding that the Board:

> relied solely on 'speculation and conjecture' to support its assertion that Miller's holding out while performing accounting and tax services would mislead the public into believing the he is providing regulated accounting services.

117 F.3d at 1383. The Board offered a public opinion poll showing that the public believes CPAs will perform accounting services competently, that the public is aware of and relies upon state regulation of the public accounting profession, and that the CPA profession generally has attained a high level of public confidence and reliance. This evidence is more than "speculation and conjecture," and proves that Miller's use of the term "CPA" on the facts of this case is misleading as well as false.

CONCLUSION

For all of the reasons set forth herein and in the Petition for Writ of Certiorari, the FICPA as amicus curiae respectfully urges the Court to grant the Petition.

Respectfully submitted,

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